2008

Pyper v. Bond : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

DAVID PYPER	)	
	)	**APPELLANT REPLY BRIEF**
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	Case No: 20080906-CA
	)	
JUSTIN C. BOND, DALE M.	)	ORAL ARGUMENT REQUESTED
and ALISON D. BOND	)	
Defendants-Appellants	)	
	)	

APPEAL FROM A FINAL ORDER OF THE SIXTH DISTRICT COURT
IN AND FOR SANPETE COUNTY, STATE OF UTAH,
THE HONORABLE DAVID MOWER, PRESIDING

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II. TABLE OF AUTHORITIES

CASES

UTAH RULES OF CIVIL PROCEDURE

III. ARGUMENT

1. APPELLANT IS NOT CHALLENGING THE TRIAL COURT'S FINDINGS OF FACT BUT THE APPLICATION OF THOSE FACTS TO THE CONTROLLING CASE LAW

Appellee argues Appellant has failed to marshal the evidence and thus cannot challenge the Trial Court's Findings of Fact. However, Appellee fails to understand Appellant is not challenging the Trial Court's Findings of Fact. Rather, Appellant is challenging the Trial Court's application of those facts to the controlling case law and the Utah Rules of Civil Procedure Rule 69C. In addition, Appellant is arguing the Trial Court did not use the correct rule pursuant to *Young v. Schroeder*, 37 P 252 (Supreme Court of the Territory of Utah 1894), *Mollerup v. Storage Systems International*, 569 P.2d 1122 (Utah 1977), and *Huston vs. Lewis*, 818 P.2d 531 (Utah 1991).

In the Trial Court's Memorandum Decision, the Trial Court states:

> The following circumstances must be present for the Court to set a sale aside. First, the sale price should be inadequate. Young at 254. The inadequacy should be "so gross as. . .to shock the conscience of all fair and impartial minds". . . .A moving party is not required to prove fraud in the purchase of property for an inadequate price. "Slight circumstances of unfairness in the conduct of the party benefited by the sale" are enough to raise the "presumption of fraud." Therefore, the Court should consider any unfairness in the conduct of the purchasing party.
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> *Trial Court Memorandum page 7.*

This is the controlling rule relied on by the Trial Court. This language is taken from *Schroeder*; however, this is not the rule set forth by the Supreme Court in *Schroeder*.

In *Schroeder*, the Supreme Court quotes the following passage from the United States Supreme Court in *Graffam v. Burgess*, 117 U.S. 192, 6 Sup. Ct. 686.

> From the cases here cited we may draw the general conclusion that, if the inadequacy of price is so gross as to shock the conscience, or if, in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property or party interested has been for any other reason misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold. Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale and raise the presumption of fraud.
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> *Schroeder* at 254.

At this point the Supreme Court stops quoting *Graffam* on continues in the Court's own voice stating:

> All the cases unite in the doctrine that on gross inadequacy of price, coupled with irregularities attending the sale, especially when such irregularities are not merely formal and technical, but such as have a direct tendency to prevent the realizing of a fair price for the property sold, and are attributable to the purchaser at the sale, it is the duty of the courts to set the sale aside. . . .
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> *Schroeder* at 254.

This is the actual holding of the Supreme Court in *Schroeder*. The Trial Court has pulled dicta out of *Schroeder* and used that dicta as the rule in making the Trial Court's Memorandum Decision.

Later on in *Schroeder* the Supreme Court uses the term, "substantial irregularities," and, in fact, determines that the sale in *Schroeder* was attended by such substantial irregularities as must have prevented a sale at a fair sum. *Schroeder* at 254. This now becomes the rule used in *Mollerup v. Storage Systems International*, 569 P.2d 1122 (Utah 1977).

In *Mollerup*, the Utah Supreme Court stated,

> Notwithstanding the foregoing, a court, sitting in equity, may in appropriate instances extend the [redemption] period. This Court has recognized that equitable principle by setting aside a sale after the time for redemption had expired, when the sale was attended by such substantial irregularities as must have prevented a sale at a fair sum, resulting in a gross sacrifice of the judgment creditor's property.

Thus, the rule is clear from the language of both *Schroeder* and *Mollerup*: the *sale itself* must be attended by such substantial irregularities as must have prevented a sale at a fair sum. However, the Trial Court has applied the wrong controlling rule to the facts in this action.

The Trial Court's statement that "great inadequacy of price coupled with unfairness raise a presumption of fraud on Respondent's behalf" is incorrect and inconsistent with the Utah Supreme Court cases dealing with this issue.

It should be noted that the Trial Court, after a full evidentiary hearing on this matter, did not find there were substantial irregularities attending the sale that prevented the property from being sold at a fair sum.

It should also be noted that in all the cases dealt with by the Supreme Court regarding this issue, *Schroeder* is the only one where the Supreme Court actually sets

aside the sale. The basis upon which the Supreme Court sets aside the sale in *Schroeder* is that there were in fact many substantial and serious irregularities *with the sale itself*. For instance, the creditor in *Schroeder* directed the land be sold in separate parcels as to prevent its bringing in a fair price. In essence, the creditor influenced how the sale was conducted and how the property was to be sold. The creditor took direct action in the sale itself and influenced the outcome. Further, the creditor assured the debtor the statutory redemption period would not be relied upon.

In the present action, the parties stipulated that the sheriff's sale was fair and conducted according to all the rules and regulations, and therefore there were no substantial irregularities as required by *Schroeder* and *Mollerup*.

Based on the above, the Trial Court applied the wrong standard in the Trial Court's Memorandum Decision.

2. THE APPLICABLE STANDARD OF REVIEW IS NOT ABUSE OF DISCRETION. THE PROPER STANDARD IS THE APPELLATE COURT GIVES NO DEFERNCE TO THE TRIAL COURT'S RULING BUT REVIEWS IT FOR CORRECTNESS

Appellee argues the proper standard is for this appeal abuse of discretion. This argument is predicated on Appellee's argument that Appellant is challenging the Trial Court's Findings of Fact and has failed to marshal the evidence. However, as stated above, the Appellant is not challenging the Trial Court's Findings, but rather Appellant is arguing the Trial Court used the incorrect rule from the controlling case law.

3. THE TRIAL COURT'S RULING WAS NOT A REASONABLE DECISION AND EVEN IF THE TRIAL COURT APPLIED THE PROPER RULE, THERE IS NO BASIS TO SET ASIDE THE SHERIFF SALE

Appellee next argues that the Appeal fails because the Trial Court's decision was a reasonable decision.

The decision by the Trial Court was not a reasonable decision. Further, even if the Trial Court applied the correct rule, there is no basis to set aside the Sheriff sale.

First, the slim basis of unfairness upon which the Trial Court made its ruling frustrates the purpose of Rule 69C. Rule 69C gives ample time for a debtor to address the sale. Rule 69C very clearly provides safeguards if there are disputes about the amounts. Finally, the Courts have even granted debtors extensions of the redemption period. See *Mollerup*.

The Trial Court's ruling merely states if there is a gross inadequacy of price and slight circumstances of unfairness the sale should be set aside. However, the Trial Court fails to address Appellee's failure follow the very clear procedures outlined in Rule 69C, such as paying the redemption amount into the Court, and his failure to utilize the remedies set forth in case law, such as petition the Court to extend the redemption period. The Trial Court also failed to address Appellee's failure to show Appellents any evidence that Appellee actually had any money to pay the judgment.

The entire basis of Appellee's claim is that Appellee tried to contact the Appellant's 28 times to obtain a payoff amount. It should be noted that the greater amount of these contacts, as stated by Appellee, are after the redemption period had expired.

Also, the Trial Court made findings that Appellee was requesting the lien be removed so Appellee could obtain a loan from the bank to pay off the judgment. *Trial Court Memorandum Page 3, 4, 5*. Thereafter, Mr. Bond and Mr. Dorius agreed they would not be wiling to release the lien. This was based on the fact the Firm had had so many problems with Appellee in the past. **R 450 p. 213. R. 450 p. 201.** Appellants had no obligation to release the lien so that Appellee could obtain a loan. Appellants could not trust Appellee to follow through with his agreements based on the history they had with Appellee.

Since the Probate proceedings were concluded, Appellee had repeatedly ignored requests for payment. Appellee had absolutely no contact with Appellants regarding the attorney fees and the judgment. This refusal of Appellee to respond to requests for payment began in 2004. **R. 450 p. 191. R. 168.** It was only right before the redemption period was about to expire in 2007 that Appellee decided to make an effort to contact Appellants. Appellants had absolutely no response from efforts to collect attorney fees prior to that time. Further, Appellee filed several bankruptcies, all of which were dismissed by the bankruptcy court. Therefore, Appellants did not believe they could rely on Appellee to follow through with any statements Appellee made. **R. 168.**

Appellee never forwarded any bank documents or loan applications or any other verification that Appellee had some financing available at the time. Appellee was asking Appellants to take him at his word that he was going to pay off this amount with some loan, yet never provided any verification this was correct. If it is correct Appellee had the financing available, it would have been simple to bring those documents to the

evidentiary hearing and say look, here is what the bank was requesting, and I could not obtain the amounts from Appellants.

In addition, it would have been simple for the bank, or Appellee, to look at the judgment that was filed against the property. The judgment amount was clearly stated in the Notice of Lien filed against the property and recorded with the County Recorder and contained in the Court records. All of the actions taken by Appellee were to frustrate the process and circumvent the rules. Appellants had no obligation to release the lien against the property. Too much time had passed and Appellants were not willing to rely on any statements or negations made by Appellee.

Also, Appellee made the statement that he had financing available to pay off the amount, and he had the money to pay off the amount. *Trial Court Memorandum page 4.* If Appellee did in fact have the money available as he claims, why did he not tender it with the Court. Appellee clearly knew what the judgment was: the judgment, notice of lien, etc were all personally served on the Appellee. Further, the judgment amount was in the Court's records. Appellee could have easily looked at the Court record and then tendered that amount to Appellants.

Further, Appellee could have petitioned the Trial Court for an extension of time for redemption, gathered the information he claims he needed, and took care of this matter. (In *Mollerup* the debtor filed an ex-parte motion for extension on the day the redemption period expired. The Court granted an extension of the redemption period but refused to grant a second extension after the party failed to perform. *569 P.2d 1122* at 1123.

Appellee had many avenues to resolve this matter. Instead, Appellee chose to let the redemption period expire and then turn on Appellants and accuse them of some kind of unfairness and bad faith. Appellant ignored this matter for four years and then made several phone calls right before the lapse of the redemption period and now accuses Appellant for acting in bad faith.

Appellee did not take any reasonable measures to settle this matter other than contact Appellants and make an offer of $8,500.00 and request the lien be removed right before the expiration of the redemption period.

Based on the above, the ruling by the Trial Court was not a reasonable decision. Even if the Trial Court had followed the correct rule, there is no basis to set aside the sale. Appellee's conduct does not warrant the setting aside of a sheriff's sale. Appellee had six months to address the redemption and approximately four years to address the judgment. Appellee took no action until right before the time lapsed and offered no verification he had the means to settle the matter.

IX. CONCLUSION

In conclusion, Appellants acted in all ways fair and in accordance with the rules and procedures. The sale was conducted pursuant to the Rule of Civil Procedure 69C and carried out by the Sheriff. Appellants have expended a substantial amount of time, effort and expense in obtaining the execution, and are still expending time, effort and expense responding to Appellee's attempts to skirt the rules, misrepresent the facts and frustrate the process.

Finally, the trial court improperly applied the case law in this action. The trial court merely found that gross inadequacy of price and slight circumstances of unfairness warrant setting aside the sale. As outlined above, the sale must also be attended by substantial irregularities, which prevent a sale at a fair sum, resulting in a gross sacrifice of the judgment creditor's property. In the present matter all parties stipulated there were no irregularities with the sale.

Based on the above, the Appellate Court should reverse the Trial Court's decision to set aside the Sheriff's sale and vest the property at issue in this action to Appellants.

DATED this day of April, 2009.

DORIUS & REYES

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Jennifer Reyes, Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this ___day of April, 2008, I caused two true and correct copies of the foregoing Brief of Appellants to be served upon the following:

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